



CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

September 12, 2000

H.R. 1142 **Landowners Equal Treatment Act of 1999**

As ordered reported by the House Committee on Resources on June 21, 2000

SUMMARY

H.R. 1142 would address the protection of property rights that may be affected by federal actions taken under the Endangered Species Act (ESA). Specifically, the bill would require the government to compensate property owners whose use of any portion of their land or water rights has been limited by regulatory actions to implement the ESA. The bill would require that any compensation owed to a property owner as a result of enacting this legislation must be paid from funds appropriated to the agency that caused the limitation to property owners.

Implementing H.R. 1142 would involve both administrative expenses and compensation payments, both of which would be spent primarily by the U.S. Fish and Wildlife Service (USFWS), which is the primary agency charged with carrying out the ESA.

CBO estimates that in the first few years following enactment, the USFWS would spend \$5 million to \$10 million annually to develop and implement the administrative procedures necessary to carry out the bill's compensation provisions. We expect that administrative costs would fall to \$2 million or \$3 million a year thereafter.

We estimate that the USFWS also would make some payments of compensation, but this cost is highly uncertain and would depend on how property owners and the agency would react to the legislation and how the legislation would be interpreted by the Administration and the courts. While CBO is not able to provide any precise estimate of compensation costs, we expect that aggregate payments of compensation would be less than the administrative costs in the first few years after enactment, because (1) the bill's requirement that the USFWS pay compensation from its own appropriations would probably reduce the number of agency actions that affect property values, (2) many initial claims would probably be ineligible for compensation, and (3) those initial claims that are paid are likely to be small.

In any case, both administrative expenses and compensation costs to implement this legislation would depend on the appropriation of the necessary amounts. Enactment of the bill would not affect direct spending or receipts; therefore, pay-as-you-go procedures would not apply.

H.R. 1142 contains no private-sector or intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

MAJOR PROVISIONS

H.R. 1142 would direct federal agencies that carry out the ESA to avoid, minimize, or mitigate the impacts that their actions have on nonfederal property (that is, any property not owned by the federal government, which would include state and local holdings). Under H.R. 1142, an agency could not implement the ESA in such a way that would result in a federal use of nonfederal property unless the agency obtains written permission from the landowner, negotiates an agreement authorizing the use, or pays compensation.

The bill defines federal use of property to include both direct actions (such as incorporating nonfederal property into a federal facility) and indirect actions (such as declaring private property to be critical habitat for a species or denying a federal permit necessary for certain uses of private land). Indirect use, which is referred to by the bill as “constructive use,” would have to be paid for by the federal government if it would result in a substantial diminution in the normal use of property, a loss in property value of 25 percent or more, or any reduction in the quantity of water available (in cases involving water rights).

The procedure for requesting compensation for the federal use of private property under the ESA is set out generally in section 3 of the legislation. A property owner seeking compensation would first make a written request to the agency. If the agency and the property owner can agree on compensation, the agency would pay the negotiated amount. If, after 180 days, the parties cannot agree on compensation, the owner may seek resolution through binding arbitration or a civil suit. Awards resulting from arbitration or litigation would include attorneys’ fees and related costs such as appraisal expenses. Court awards would include interest calculated from the beginning of the federal action.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

CBO estimates that the USFWS would spend \$5 million to \$10 million annually to develop and implement the administrative procedures necessary to carry out the bill’s compensation

provisions. We expect that administrative costs would fall to \$2 million or \$3 million a year thereafter. CBO cannot estimate the amount of compensation that the agency may have to pay to property owners under this bill, but we expect that such payments would be less than the administrative costs in the first few years after enactment. Both administrative expenses and the payment of compensation to property owners would be subject to the appropriation of the necessary amounts.

BASIS OF ESTIMATE

CBO expects that enacting H.R. 1142 would result in a great number of requests for compensation by property owners, particularly those affected by previous USFWS regulatory actions. CBO believes that the majority of such claims would stem from the creation of an administrative forum, which would provide most property owners with a cost-effective way to seek compensation. We expect that the vast majority of claims made under H.R. 1142 would begin and end administratively, and that relatively few claims would be pursued further.

Civil court suits for compensation brought against the United States might also increase—especially since so few are made under existing law—but we expect that any increase in litigation would be small and would involve larger monetary claims that might have been brought anyway under existing law.

Responding to the new requests for compensation would involve two types of federal expenditures: administrative expenses incurred by the USFWS to process claims and permit requests, and the payments themselves.

Administrative Expenses

Assuming appropriation of the necessary amounts, CBO estimates that the USFWS would spend \$5 million to \$10 million a year over the next two or three years to implement an administrative program to process compensation requests related to previous agency actions. After this period, ongoing administrative expenses would probably fall to \$2 million or \$3 million a year to consider compensation requests related to new agency actions.

Previous Agency Actions. CBO expects that property owners affected by past USFWS actions, including previous designations of critical habitat, would apply for compensation even though they would probably not receive notification of the bill's compensation provisions from the agency (the notifications required under the bill would apparently not apply to past agency actions, but we expect that would not stop landowners from seeking

compensation). What would happen after such applications are made is uncertain. Although we expect the USFWS to reject such claims (because they involve actions taken before enactment), each would still require some minimal expense to process.

Once the claims relating to previous USFWS actions have been processed and rejected, we expect some landowners would probably apply for incidental take permits (which are permits to develop any land subject to ESA regulations) to receive a rejection that could then form the basis of another request for compensation. CBO expects that relatively few landowners would employ this strategy, however, because incidental take permits are expensive and time consuming for the average small landowner to pursue.

Depending on how quickly claims and permit applications arrive and what priority the USFWS gives them, processing requests related to previous actions under the ESA would add \$3 million to \$7 million annually to the cost of the endangered species program over the next few years.

New Agency Actions. CBO expects that the USFWS would take steps to mitigate the effects of its actions to implement the ESA on property owners, as mandated by the bill. Nevertheless, we expect that the agency would continue to receive a number of claims each year, particularly claims involving losses due to designation of critical habitat. Whether those claims result in the payment of compensation or not, we estimate that processing such requests would cost \$2 million or \$3 million annually.

Payments of Compensation

H.R. 1142 would establish a new cause of action in the ESA for property owners whose property is affected by federal regulatory actions. Instead of asserting that their property has been taken in violation of the fifth amendment of the Constitution (as they must under current law), property owners could seek compensation for federal use of their property under this new statutory process.

In addition to this fundamental change, the provisions of the bill would change current law in two important ways that could affect how property owners seek, and how federal agencies pay, compensation. First, the bill would provide an administrative forum for seeking compensation as an alternative to litigation. Second, the bill would delineate specific standards and definitions to be used in determining when and what the government owes when its actions affect the use of nonfederal property.

Compensation under Current Law. Under existing law, persons who wish to seek compensation for property that they believe has been adversely affected by a government action usually must do so through litigation—generally in the United States Court of Claims.

The process is time-consuming and expensive. Property owners who bring suit in the Claims Court typically wait at least two years before their cases are heard. Decisions unfavorable to the government have been rare in the past because of the high loss thresholds required before the courts will award compensation. Property owners who pursue such cases can expect the government to appeal unfavorable decisions, which often adds years to the process. Because the costs of waging a protracted court battle are greater than most property owners can afford, relatively few compensation claims are brought against the United States (although there has been a steady increase in the last decade). Those cases that are brought typically involve relatively large claims (\$100,000 to more than \$100 million) and are usually brought by corporations or other large property owners. Such claims can require more than a decade to resolve. As a result, the few awards that are paid often include more for interest and the reimbursement of litigation costs than for compensation.

Compensation under H.R. 1142. The most immediate effects of the legislation would stem from the creation of an administrative forum for property owners to seek compensation. This provision would make it much easier for private property owners to seek compensation. Typically, persons affected by endangered species regulations are small landowners who often cannot afford to sue the federal government or who would not expect to receive enough compensation to justify the substantial expense of attorneys and experts. Thus, without the administrative claims process created by the bill, most of these people would not be able to take advantage of the 25-percent loss threshold or other standards established by the bill that might increase a landowner's chance of prevailing against the government.

Creating an administrative forum would affect primarily small claims. Although the number of administrative claims could be quite large at first, CBO expects that relatively few would result in payment because:

- The USFWS would probably reject a large portion of early claims (such as those involving agency actions prior to the bill's enactment) by deeming them to be outside the scope of the bill;
- The agency would probably argue that some actions, such as designations of critical habitat, are not imposed on specific properties and therefore do not cause any real restrictions on the ability to use individual parcels. To seek compensation for such actions, a property owner would then either have to file for an incidental take permit and receive a rejection or sue the USFWS for compensation;
- Many typical USFWS actions, such as regulating the use of pesticides, might not substantially diminish the normal or reasonably expected uses of the property or reduce its value by 25 percent or more, or

- The requirements that compensation payments be made from agency appropriations would cause the USFWS to try to resolve as many claims as possible without having to pay any compensation—for example, by reversing or modifying permit decisions or enforcement actions, by processing permit applications more quickly, and by working more closely with landowners to negotiate permit conditions.

Further, we estimate that any compensation payments eventually made through the administrative process would involve relatively small amounts (often as little as a few thousand dollars), largely because the vast majority of claims would likely involve small parcels of land or some minor fraction ("affected portion") of larger tracts. In addition, under the bill the government would only be responsible for paying the diminution of value, which would most often involve very minor amounts, rather than the value of the entire affected property (as is usually the case under current law).

CBO expects that enacting H.R. 1142 also would result in an increase in civil litigation, at least in the short run, because the new 25-percent loss threshold and other provisions would almost certainly induce more property owners to seek compensation. Because property owners would first have to overcome the costly administrative hurdle of seeking and being denied an incidental take permit, most such lawsuits would involve larger, more complicated claims (those over \$1 million). Even if the government would ultimately lose more lawsuits as a result of the legislation, additional compensation costs would probably be minimal in the 2001-2005 period because claims would take several years to resolve. Large claims brought under the bill would still involve many of the same factors that prolong litigation under existing law, including a lengthy discovery period, court delays, and valuation disputes. Moreover, in the early years many new claims would likely involve conflicting interpretations of the statute that could take a number of years to resolve through the judicial process.

The effect of H.R. 1142 on federal compensation costs in later years would depend on the outcome of this process and is very difficult to predict. On the one hand, it is likely that the legislation would cause property owners to bring—and possibly win—more suits than in the past. On the other hand, while we expect the USFWS to deny most claims, we cannot predict the response of property owners or the courts. Neither can we predict how the courts will resolve some of the more complicated issues such as those related to the determination of critical habitat, diminution in “normal use,” or valuation. Moreover, the requirement that agencies pay all compensation awards, including interest and reimbursements of costs, from their operating budgets could have the effect of limiting potential costs under this legislation because this requirement would encourage the USFWS to avoid actions that would cause property owners to seek compensation.

PAY-AS-YOU-GO CONSIDERATIONS: None.

INTERGOVERNMENTAL AND PRIVATE-SECTOR IMPACT

H.R. 1142 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

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